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In The

Supreme Court of the United States

SITTHIPHONE PHENGSENGKHAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

PATRICK G. O'BRIEN
Counsel of Record
EDWIN T. ARADI
AKIN GUMP STRAUSS
HAUER & FELD LLP
1700 Pacific Avenue,
Suite 4100
Dallas, Texas 75201
(214) 969-2800

Attorneys for Petitioner

October 29, 2009

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

(1) Petitioner and his brother were tried together in a joint trial. The two brothers have complicated, similar names. Throughout the trial, the lawyers, a witness, and the District Judge confused the identities of the brothers. Considerably more evidence was offered against Petitioner's brother than against Petitioner himself, which combined with the identity confusion to confuse and substantially mislead the jury. The Fifth Circuit determined, in conflict with decisions from the Fourth and District of Columbia Circuits, that the District Court did not err in proceeding with a joint trial. Was Petitioner's constitutional right to a fair trial violated by the joint trial?

(2) After conviction, the District Court gave a rote and exceptionally brief explanation for why it imposed a 293 month sentence. The explanation did not consider, much less apply 18 U.S.C. § 3553(a) or any of the factors outlined therein. The Fifth Circuit held, in conflict with the Third and Sixth Circuits, that the District Court was not required to say more than it did. Was the District Court's sentence unreasonable for failing to give adequate consideration to the § 3553(a) factors on the record?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sitthiphone Phengsengkham[1] respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit affirming the petitioner's conviction is reported at *United States v. Tran*, No. 07-11195, 2009 WL 2351619 (5th Cir. July 31, 2009), and appears in the Appendix at App. 1.

JURISDICTION

On July 31, 2009, the Fifth Circuit entered its opinion affirming petitioner's conviction, along with those of his co-defendants. App. 1. Its judgment was issued the same day. App. 9. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

[1] Due to the complex and difficult to pronounce names involved in this case, the entire record refers to petitioner Sitthiphone Phengsengkham as "Teddy" and refers to his brother, Itthison Phengsengkham as "Eddy." To be consistent with the record, these "nicknames" will be used throughout this Petition.

RELEVANT RULE AND STATUTORY PROVISION

Fed. R. Crim. P. 14(a)

18 U.S.C. § 3553(a)

Pursuant to United States Supreme Court Rule 14(f), the text of Federal Rule of Criminal Procedure 14(a) and 18 U.S.C. § 3553(a) appear at App. 31.

STATEMENT OF THE CASE

Rule 14 of the Federal Rules of Criminal Procedure provides that separate trials of co-defendants should be provided where justice requires. In this case, justice required a separate trial between petitioner Sitthiphone (Teddy) Phengsengkham and his brother and co-defendant Itthison (Eddy) Phengsengkham after a number of instances of identity confusion between the two defendants occurred before the jury. The jury convicted Teddy of conspiracy and the district court sentenced him to 293 months' imprisonment, making no mention or consideration of the required factors under 18 U.S.C. § 3553(a). In conflict with this Court's precedents and contrary holdings in other Circuits, the Fifth Circuit affirmed Teddy's conviction and sentence.

1. Sitthiphone (Teddy) Phengsengkham was convicted and sentenced for conspiracy to possess with intent to distribute methamphetamine and cocaine and to commit money laundering. App. 10, 18.

At trial, one of Teddy's co-defendants moved to sever the trials among the defendants, due to the disparity of evidence between one defendant, Itthison (Eddy) Phengsengkham, and the other defendants. App. 55. Severance was denied, however, and the four defendants, including brothers Teddy and Eddy Phengsengkham were tried together. App. 30.

2. Throughout the five day trial, blatant instances of identity confusion between co-defendants Teddy and Eddy occurred in front of the jury without any curative instruction or admonition. On numerous occasions, either a witness, a lawyer, and even the District Court itself confused the identities of these two co-defendants.

These instances of identity confusion in front of the jury included (a) a DEA agent mistakenly identifying Teddy as owning a trailer where drugs were found, App. 35, (b) counsel for a co-defendant confusing the extent of the evidence against Teddy and Eddy when questioning a witness, App. 43, and (c) the District Judge mistakenly saying Teddy's name when discussing Eddy, App. 46.[2] No admonitory instructions were given on any of these occasions. In addition, another instance of confusion occurred outside the presence of the jury when Eddy's counsel blatantly

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[2] That the District Court could not keep the identity of the two defendants straight highlights the prevalent issues and undermines the decision to permit a joint trial in this case.

confused the two brothers when talking to the court. App. 50.

These examples of identity confusion between the two co-defendants, who had confusingly similar names that were already hard to pronounce, as well as confusingly similar nicknames, illustrate the difficulty the witnesses, lawyers, judges, and ultimately the jury, had in keeping the defendants' identities straight. Obviously, if it was this difficult for parties who were intimately familiar with the case (a DEA agent, the lawyers, and the District Court) to keep the identities of Teddy and Eddy straight, it must have been much more difficult for an unfamiliar lay jury in West Texas listening to this confusing evidence over a five day period to do so. In these circumstances it would have been virtually impossible for the jury to compartmentalize the evidence and treat each defendant independently.

3. The prejudice to Teddy created by this identity confusion was compounded by the significant portion of the trial spent discussing the voluminous amount of evidence concerning Eddy's criminal history and direct criminal acts in this case. In contrast, no direct evidence of criminal activity was presented against Teddy.

In particular, the evidence presented at trial demonstrated that Eddy had been convicted of drug crimes in the past, was involved in multiple individual drug transactions with cooperating informants in this case, had been involved in the drug trade for years before, and was also intimately involved in

running the drug operations. Nothing remotely close to this level of evidence was introduced against Teddy.

Despite these prejudicial circumstances, the joint trial continued without any severance.

4. The jury convicted Teddy of conspiracy to distribute cocaine and methamphetamine and conspiracy to launder money on August 20, 2007. Teddy was sentenced to 293 months' imprisonment on November 13, 2007. During sentencing, the District Judge chose to "explain" its sentence using only two sentences. App. 14. The District Judge did not once reference the controlling statute, 18 U.S.C. § 3553(a), much less the required sentencing factors stated therein. *Id.*

5. Teddy appealed his conviction to the Fifth Circuit, arguing that he was denied a fair trial and that, at a minimum, his sentence was unreasonable for the failure to consider the required § 3553(a) factors. The Fifth Circuit summarily affirmed his conviction on July 31, 2009, along with those of his co-defendants. The Fifth Circuit found that no substantial prejudice resulted from the multiple instances of identity confusion between Teddy and Eddy, and that the evidence relating to Eddy's criminal behavior did not make the joint trial plainly erroneous. App 4-5.

Ironically, even the Fifth Circuit's opinion rejecting Teddy's contention of identity confusion itself confuses the brothers' identities in one instance. Discussing co-defendant Tuan Anh Tran's argument that severance should have been granted, the court

states: "[e]ven assuming that severance would have permitted Tran to compel *Eddy's* testimony – an argument he failed to raise below – Tran failed to present the requisite proof of his need." App. 4 (emphasis added). But Tran did not argue in his appellate brief that he was denied the chance to compel Eddy's testimony. Instead, he argued that he was denied the chance to compel *Teddy's* testimony. App. 62. Thus, the facts of this case present three more judges, the very judges deciding Teddy's fate, who could not keep Teddy's and Eddy's identities straight.

The Fifth Circuit additionally affirmed Teddy's sentence of 293 months, holding that this sentence was presumptively reasonable because it fell within the Guideline range (although at the very top). App. 7. The court also stated that the failure to expressly cite § 3553(a) was "immaterial" and the "decision to impose a within-guideline sentence required no more detail than was provided." App. 7-8.

6. This petition followed.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S DECISION DENYING A FAIR TRIAL WHERE THERE ARE NUMEROUS INSTANCES OF IDENTITY CONFUSION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND DOES NOT COMPORT WITH NOTIONS OF BASIC JUSTICE.

1. This case presents the Court an opportunity to resolve a growing division among the Circuits over important procedural issues. First, whether a defendant's right to a fair trial is violated amid multiple instances of identity confusion based on the confusingly similar names of co-defendants, combined with an overwhelming disparity of evidence between them. The Fifth Circuit held that there was no prejudicial error to Teddy even though multiple people, including a witness, the lawyers, and the district judge were confused as to who was who. In fact, even the Fifth Circuit confused the identities of petitioner Teddy and his brother Eddy. In contrast, the Fourth and District of Columbia Circuits have held that a court may, and in fact should, sever a case involving such pervasive confusion.

This division of authority reflects a broader conflict percolating in the Circuit courts over the proper application of this Court's construction of Rule 14 in *Zafiro v. United States*, 506 U.S. 534, 539 (1993). Teddy can prevail under Rule 14 and *Zafiro* because of the repeated confusion of identities throughout the trial, compounded by the disparity of evidence offered between Teddy (minimal) and Eddy (overwhelming).

Accordingly, this Court should grant certiorari to resolve the Circuit conflict and provide proper interpretation of *Zafiro* and Rule 14 in this common situation.

2. The Fifth Circuit's decision that there was no prejudicial error in proceeding with a joint trial despite the multiple instances of identity confusion, compounded by the disparity in evidence between the two defendants, is in conflict with decisions from at least two other Circuits. Both the Fourth Circuit and the D.C. Circuit have found that joint trials are prejudicial and violate a defendant's constitutional right to a fair trial where there are instances of identity confusion between the defendants.

a. *The Fourth and D.C. Circuits.* First, in *United States v. Coward*, the Fourth Circuit held that defendants named Coffey and Coward should not have been tried together due to their similar names and evidence of identity confusion. 630 F.2d 229, 231 (4th Cir. 1980). Indeed, the court noted the "most significant incident" was when the prosecutor mistakenly named one defendant in closing argument as having conducted one action, meaning the other defendant. *Id.* As here, the record indicated that this mistake was corrected soon afterward. *Id.* But, in contrast to the Fifth Circuit's holding, the Fourth Circuit held that this correction was not sufficient to eliminate the inherent confusion imposed on the jury. *Id.* As the Fourth Circuit noted, although the trial court "did everything possible" to eliminate any prejudice, "[t]his proved to be an impossible chore . . . due both

to the subtleties of the evidence and to its emanation from common sources." *Id.* The court therefore held that it was "clear that the defendants should have been tried separately" and ordered a new trial. *Id.*

Similarly, in *United States v. Sampol*, the District of Columbia Circuit held that a single instance of identity confusion in a conspiracy trial was sufficient to create unconstitutional prejudice and require separate trials. 636 F.2d 621, 647 (D.C. Cir. 1980). *Sampol* involved two brothers named Ignacio and Guillermo Sampol who were charged with conspiracy and murder. The court found that Ignacio Sampol was prejudiced when, among other things, "on one occasion the confusion [for the jury] was so great that one of the witnesses at the trial, describing a meeting in Venezuela, named Guillermo, but pointed to Ignacio." *Id.* As in the present case, no curative instruction was given. *Id.* The D.C. Circuit recognized that a joint trial in this circumstance is fraught with peril: "Perhaps this misidentification symbolized the inevitable failure of this particular joint trial. There was never the clear distinction between the different defendants and the evidence against each of them that is called for by the Constitution's guarantee of a fair trial." *Id.* The court noted that the vast bulk of the testimony and evidence concerned the actions of Guillermo, and did not directly implicate Ignacio. *Id.* Consequently, the disparity of evidence, combined with the identity confusion, caused a violation of the right to a fair trial. *Id.*

b. *The Fifth Circuit.* The Fifth Circuit's decision creates a conflict with the Fourth Circuit's and D.C.

Circuit's decisions in situations involving identity confusion combined with a disparity of evidence. On the one hand, *Coward* and *Sampol* hold that when co-defendants are misidentified, and this mistake is compounded by a disparity in the evidence, a joint trial violates the defendant's right to a fair trial. On the other hand, the Fifth Circuit's decision in this case holds that repeated instances of identity confusion, combined with an overwhelming disparity in evidence, are not enough to constitute prejudicial error.

The Fifth Circuit attempts to distinguish *Sampol* by stating that Teddy and Eddy were charged with the same conspiracy, but this has no bearing on the decision. The same cannot be said of the decision in *Coward*, and that reasoning directly conflicts with this Court's admonitions in *Zafiro v. United States* that joint trials in conspiracy cases may cause a violation of a defendant's right to a fair trial. 506 U.S. 534, 540 (1993) ("[E]vidence of a co-defendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty.").

Accordingly, this Court should grant certiorari to resolve the Circuit split concerning the application of Rule 14 to instances of identity confusion compounded by a disparity of evidence between defendants with confusingly similar names.

3. Certiorari is further warranted because the Fifth Circuit's holding is wrong under this Court's standards in *Zafiro*.

Rule 14 provides that severance is appropriate where "justice requires." In applying Rule 14, this Court in *Zafiro* explained that a severance should be granted in two situations: (1) where a joint trial would compromise a specific trial right of one defendant; or (2) where a joint trial would prevent the jury from making a reliable judgment as to guilt or innocence. 506 U.S. at 539. Here, Teddy's joint trial exemplifies both situations as the joint trial with his brother compromised his right to an individual determination of guilt, and confused the jury.

4. It is undisputed that there were multiple instances of identity confusion between Teddy and Eddy, which took place before the jury. It is also undisputed that these repeated instances of confusion occurred from multiple sources over the course of a five day trial. The lawyers, a witness, and the District Court all confused Teddy and Eddy at some point during the trial. This certainly prevented the jury from making a reliable determination as to guilt or innocence. How could lay jurors be expected to keep the defendants straight (or the evidence presented against each defendant) when it was impossible for the lawyers, witnesses, and judges in the case to keep them straight?[3]

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[3] Although the Fifth Circuit applied "plain error" as the standard of review, App. 4, the applicable standard of review is abuse of discretion because one of the co-defendants filed a motion for severance, which was summarily denied by the District Court. App. 30. Any subsequent motion for severance under Rule

(Continued on following page)

5. The disparity of the evidence offered against each brother heightened the need for severance and compounded the prejudice caused by the identity confusion. As this Court noted in *Blumenthal v. United States*, a real danger in a conspiracy case is that the jury will take evidence that is only admissible and relevant as to one defendant, and use the evidence to convict the co-defendant as well. 332 U.S. 539, 559-60 (1947); *see also Zafiro*, 506 U.S. at 540.

Here, nearly the entire trial was spent on Eddy's criminal history and specific criminal acts in this case. No direct evidence was presented of Teddy's guilt – amounting to little more than (a) statements from co-conspirators and cooperating informants that Teddy's car (but not Teddy) was spotted outside locations connected with his brother, (b) the innocuous act of visiting an accountant; and (c) Teddy's

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14 would have been redundant and ineffective. *See United States v. Baker*, 458 F.3d 513, 518 (6th Cir. 2006) (objection by co-defendant preserved error for other defendant as to the admission of evidence); *United States v. Garcia*, 291 F.3d 127, 140 (2d Cir. 2002) ("We presume that the objection of a co-defendant is an objection for all defendants, and it is sufficient to preserve the issue for appeal."); *United States v. Pardo*, 636 F.2d 535, 541 (D.C. Cir. 1980) ("We recognize that in certain situations, it may be redundant and inefficient to require each defendant in a joint trial to stand up individually and make every objection to preserve each error for appeal."); *see also Coward*, 630 F.2d at 231 (recognizing that although defendant did not move for severance under Rule 14, it was clear that the defendants should have been tried separately). Alternatively, and at a minimum, the District Court's failure to sever Teddy's trial was indeed plain error and this Court may treat it as such.

voice on phone calls with his family talking about money – was minimal at best. Combined with the multiple instances of identity confusion, this overwhelming disparity of evidence and consequential spillover effect essentially "rubbed off" onto Teddy, denying him a fair trial. *See United States v. Kelly*, 349 F.2d 720, 759 (2d Cir. 1965). This Court should grant certiorari to correct the Fifth Circuit's denial of a constitutionally guaranteed fair trial to Teddy.

II. THE FIFTH CIRCUIT'S DECISION VIOLATED THIS COURT'S REQUIREMENTS THAT THE 18 U.S.C. § 3553(A) SENTENCING FACTORS BE CONSIDERED ON THE RECORD.

In addition, certiorari is warranted to resolve the growing Circuit split as to the degree of consideration the sentencing judge must give on the record to the § 3553(a) sentencing factors.

1. The District Court sentenced Teddy to 293 months' imprisonment on November 13, 2007, more than two years after this Court's decision in *Booker v. United States*, 543 U.S. 220 (2005). In support of its sentence the District Judge offered a mere two sentences. App. 16. Those sentences did not reflect a consideration of the required sentencing factors under 18 U.S.C. § 3553. The District Court's stated sentencing determination amounted to punishing Teddy for his "obvious criminal lifestyle" (although he did not have a criminal record), his lack of income, and regard for the safety of the community. *Id.* These terse

statements do not amount to a consideration of the required § 3553(a) sentencing factors.

2. This Court in *Rita v. United States* recently stated that only sentences that are sufficient, but not greater than necessary, to comply with the purposes of sentencing set forth in § 3553(a) are reasonable. 551 U.S. 338, 347-48 (2007). To demonstrate that the § 3553(a) factors were considered, a sentencing judge should "set forth enough [explanation on the record] to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decision making authority." *Id.* at 356. The sentencing judge cannot simply presume that a Guideline sentence is reasonable, but must evaluate each case in light of the § 3553(a) factors based on its unique, relevant circumstances. *See Kimbrough v. United States*, 552 U.S. 85, 128 S. Ct. 558, 570 (2007) (noting that a judge may determine that, in a particular case, a within-Guidelines sentence is "greater than necessary" under § 3553(a)); *Gall v. United States*, 552 U.S. 38, 128 S. Ct. 586, 597 (2007) (stating that the judge must adequately *explain* the chosen sentence to allow for meaningful review).

3. A Circuit conflict has developed since *Rita* as to how specific a sentencing judge must be on the record as to the on-the-record consideration of the § 3553(a) factors. The Third and Sixth Circuits have found that mere mentions of § 3553(a), or "rote statements" that the § 3553(a) factors were considered, do not suffice to support a reasonable sentence.

United States v. Sevilla, 541 F.3d 226, 232 (3d Cir. 2008) (characterizing the district court's statement that it "considered all the § 3553(a) factors" as a "rote statement of the § 3553(a) factors" that should not suffice); *United States v. Thomas*, 498 F.3d 336, 340-41 (6th Cir. 2007) (district court's statement that only referenced defendant's background and mainly consisted of conclusory statements was procedurally unreasonable).

In contrast, the Fifth Circuit in this case and its other precedents has held that a sentencing court is not required to cite § 3553(a) and need not provide any detail on its consideration of the § 3553(a) factors. *See, e.g.*, *United States v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006). The Tenth Circuit has likewise held that "a specific discussion of Section 3553(a) factors is not required for sentences falling within the ranges suggested by the Guidelines." *United States v. Ruiz-Terrazas*, 477 F.3d 1196, 1202 (10th Cir. 2007). Indeed, the Tenth Circuit in a recent case recognized that a Circuit split has developed regarding the procedural reasonableness of a sentencing court's explanation under § 3553(a). *See United States v. Valdez*, No. 09-1043, 2009 WL 2516846, at *2 n.1 (10th Cir. Aug. 19, 2009) (recognizing a split between its precedent and the Third and Sixth Circuit Courts of Appeals regarding the sufficiency of a sentencing judge's explanation).

4. Here, the District Court failed to provide any explanation for its sentence on the record that reflected a consideration of the § 3553(a) factors. In

fact, there was no specific mention of the nature and characteristics of the offense, or any of the § 3553(a) factors at all. Instead, Teddy received a brief, ambiguous, two sentence "explanation" that did not conform with this Court's requirements.

The Fifth Circuit's determination here that the District Court's statements were sufficient under § 3553(a) has the effect of re-imposing the mandatory nature of the Sentencing Guidelines, which was overruled in *Booker*, as it permits a District Court to simply presume a Guidelines sentence is reasonable without further explanation. This Court, however, has recently held that a sentencing judge is precluded from simply presuming that the Guideline sentence is reasonable in every given case, and must state the reasons for its sentence, even when the sentence falls within the Guidelines. *Nelson v. United States*, 129 S. Ct. 890, 891 (2009) ("Our cases do not allow a sentencing court to presume that a sentence within the applicable Guidelines range is reasonable").[4]

5. As this Court stated in *Rita*, "[c]onfidence in a judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance

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[4] As in this case, the reviewing court will be left to judge the District Court's reasons for sentencing solely on the Government's interpretation of the sentencing judge's explanation. Here, the Government used well over 200 words to try and explain what the District Court actually meant and what was actually considered in its sentence. App. 52.

that creates that trust." *Rita*, 551 U.S. at 356. This case provides a vehicle by which the Court can resolve the percolating Circuit split in the application of *Rita* and provide guidance to sentencing courts as to the proper considerations of § 3553(a) and the § 3553(a) factors on the record.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PATRICK G. O'BRIEN
Counsel of Record
EDWIN T. ARADI
AKIN GUMP STRAUSS
HAUER & FELD LLP
1700 Pacific Avenue,
Suite 4100
Dallas, Texas 75201
(214) 969-2800

Attorneys for Petitioner

IN THE UNITED COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-11195
Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

TUAN ANH TRAN; ITTHISON PHENGSENGKHAM, also known as Eddy Phensengkham; SITTHIPHONE PHENGSENGKHAM, also known as Teddy Phengsengkham

Defendants-Appellants

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 2:07-CR-65-23

(Filed Jul. 31, 2009)

Before REAVLEY, JOLLY, and OWEN, Circuit Judges.

PER CURIAM:*

Defendants-Appellants Itthison Phengsengkham ("Eddy") and Sitthiphone Phengsengkham ("Teddy") were convicted by a jury of conspiring to distribute cocaine and methamphetamine, in violation of 21 U.S.C. § 846. The same jury convicted Teddy and Defendant-Appellant Tuan Anh Tran ("Tran") of violating 18 U.S.C. § 1956(h) by conspiring to launder money. Defendants challenge their convictions on various grounds, and Teddy additionally contends that his sentence was unreasonable. For the reasons that follow, we AFFIRM:

1. Eddy asserts that the police affidavit submitted in support of the search warrant contained stale information, thus requiring suppression of the drugs and cash seized at a motel. Evidence obtained by law enforcement in good faith reliance on a warrant is admissible even if the affidavit submitted in support of the warrant was insufficient to establish probable cause. *See United States v. Craig*, 861 F.2d 818, 821 (5th Cir. 1988) (discussing *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405 (1984)). An affidavit may rely on information reaching back over long periods if "the information of the affidavit clearly shows a long-standing, ongoing pattern of criminal activity."

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

United States v. Pena-Rodriguez, 110 F.3d 1120, 1130 (5th Cir. 1997) (internal quotations and citation omitted). The court is also "more tolerant of dated allegations" if "the evidence sought is of the sort that can reasonably be expected to be kept for long periods of time in the place to be searched." *Id.* (internal quotations and citation omitted). The facts recounted in the affidavit supported the ongoing nature of the criminal activity at the motel, including within days of the warrant's issuance, and the likelihood that drugs and drug-related documents of a non-ephemeral nature would be found there. As such, the affidavit "was not so lacking in indicia of probable cause as to render good-faith reliance on a warrant issued pursuant to it entirely unreasonable." *Id.* The district court therefore correctly denied Eddy's motion to suppress.

2. Additionally, the district court did not abuse its discretion by denying Tran's motion for severance. *See, e.g., United States v. Booker,* 334 F.3d 406, 415 (5th Cir. 2003) (standard of review). "As a general rule, persons indicted together should be tried together, particularly when the offense is conspiracy." *United States v. Simmons,* 374 F.3d 313, 317 (5th Cir. 2004). For denial of severance to amount to reversible error, the defendant must show that "(1) the joint trial prejudiced him to such an extent that the district court could not provide adequate protection; and (2) the prejudice outweighed the government's interest in economy of judicial administration." *United States v. Valdez,* 453 F.3d 252, 261 (5th Cir. 2006) (internal quotation marks and citation omitted). Tran's

contentions regarding the volume of evidence relating to the separate drug-trafficking conspiracy of his co-defendants and its spillover effect are insufficient to warrant reversal. *Cf. United States v. Lewis,* 476 F.3d 369, 384 (5th Cir. 2007). The district court substantially mitigated potential prejudice to Tran by instructing the jury to consider the evidence separately as to each defendant. *See Booker,* 334 F.3d at 415-16; *United States v. Bieganowski,* 313 F.3d 264, 288 (5th Cir. 2002). Indeed, that Tran's wife was acquitted on the same conspiracy charge supports an inference that the jury adhered to this instruction. *See United States v. Ellender,* 947 F.2d 748, 755 (5th Cir. 1991). Even assuming that severance would have permitted Tran to compel Eddy's testimony – an argument he failed to raise below – Tran failed to present the requisite proof of his need for the testimony, its content, or its anticipated exculpatory effect. *See United States v. Nguyen,* 493 F.3d 613, 625 (5th Cir. 2007). Tran has failed make the compelling showing of prejudice necessary to warrant reversal.

3. Teddy, who did not move for severance or adopt the motion filed by Tran, also contends that the joint trial prejudiced his rights. Because a motion to sever requires a particularized showing of prejudice as to the complaining defendant, Tran's motion does not preserve Teddy's objection. *See United States v. Mann,* 161 F.3d 840, 861-62 & n.58 (5th Cir. 1998) (limiting review to plain error). No substantial prejudice resulted from (1) the district court's mistaken reference to Eddy as Teddy when addressing Eddy

and his counsel regarding a factual stipulation to which both agreed; (2) the two instances when witnesses confused Eddy and Teddy's names and promptly corrected themselves; or (3) when Eddy's counsel referred to Teddy by his client's name outside the presence of the jury. Teddy requested no admonitory instruction regarding these misstatements, and none was plainly required. That Teddy was charged with the same conspiracy count as Eddy also distinguishes his prosecution from *United States v. Sampol,* 636 F.2d 621, 646-48 (D.C. Cir. 1980) (joint trial between a defendant and others charged with grossly disparate offenses involving the bombing death of two people was error). Additionally, we do not find the evidence relating to Eddy's drug activities and criminal history so inflammatory and unrelated to Teddy's connection with those activities that their joint trial was plainly erroneous. *See, e.g., Bieganowski,* 313 F.3d at 287-88. Accordingly, the district court was not required to sever Teddy's trial *sua sponte* from that of his brother.

4. We reject Tran's challenge to the sufficiency of evidence underlying his conviction for conspiring with Teddy to launder proceeds from narcotics distribution. Police intercepted a phone call from Tran to Teddy after they arrested Tran's wife and seized $200,000 in drug money – half the sum paid by Teddy for the Trans' convenience store – that she was transporting to a safety deposit box at a local bank. Tran expressed concern that police might trace the funds back to Teddy and suggested that Teddy fabricate a

story that the money came from a mother and aunt who wanted to buy the store. Moreover, Tran stated that he had secreted away the remaining $200,000. The Trans later met with Teddy, his aunt, and his mother at an office to complete paperwork consummating the sales transaction. But the contract of sale was signed only by Teddy's aunt. Viewing this evidence in a light most favorable to the Government, *see Valdez,* 453 F.3d at 256, a rational jury could reasonably infer from Tran's concerted efforts to conceal the money, its source, and the unorthodox sale procedure that he was aware that the funds were derived from illegal activity but nonetheless agreed to sell the store to Teddy with the intent to further the agreement's unlawful purpose. *See United States v. Armstrong,* 550 F.3d 382, 403 (5th Cir. 2008) (elements of conspiracy under § 1956(h)).

5. Based on these facts, we find no abuse of discretion by the district court in submitting a deliberate ignorance instruction in its jury charge. *See, e.g., United States v. Orji-Nwosu,* 549 F.3d 1005, 1008 (5th Cir. 2008) (standard of review). Such an instruction is proper if the evidence supports the defendant's (1) subjective awareness of a high probability of the existence of illegal conduct and (2) purposeful contrivance to avoid learning of the illegal conduct. *United States v. Lara-Velasquez,* 919 F.2d 946, 951 (5th Cir. 1990). Tran's attempts to conceal the circumstances surrounding the sale of his store and the funds he received from Teddy amply support a subjective awareness that his conduct was illegal. *Id.* at

952 (explaining that evidence suggesting actual knowledge typically permits an inference that the defendant was aware of the high probability of illegal conduct); *see also United States v. Wofford,* 560 F.3d 341, 353 (5th Cir. 2009) ("Suspicious behavior may be sufficient to infer subjective awareness of illegal conduct."). Tran's conduct likewise substantiates that he either knew the illegality of his actions or purposefully contrived to avoid guilty knowledge. *See Lara-Velasquez,* 919 F.2d at 952 (same evidence may support both awareness and contrivance); *see also, e.g., United States v. Saucedo-Munoz,* 307 F.3d 344, 348-49 (5th Cir. 2002) (approving of a deliberate ignorance instruction when the evidence supports both contrivance to avoid learning the truth and actual knowledge). We therefore affirm Tran's conviction.

6. Finally, Teddy challenges the reasonableness of the 293-month sentence imposed by the district court for conspiring to distribute drugs, which we review for abuse of discretion. *See Gall v. United States,* 128 S. Ct. 586, 597 (2007). Because Teddy's sentence fell within the properly calculated guideline range, it is presumed reasonable. *United States v. King,* 541 F.3d 1143, 1145 n.1 (5th Cir. 2008). The district court, in relying on Teddy's criminal lifestyle, lack of legitimate income sources, and disregard for the safety of the community by distributing drugs as a basis for its sentence, duly considered factors prescribed in 18 U.S.C. § 3553(a), namely, the nature and circumstances of the offense, history and circumstances of the defendant, seriousness of the crime, and the need

to provide just punishment, deter wrongdoing, and protect the public. *See* § 3553(a)(1), (a)(2)(A), (a)(2)(B), (a)(2)(C). That the district court did not expressly cite 18 U.S.C. § 3553(a) is immaterial, and its decision to impose a within-guideline sentence required no more detail than was provided. *See United States v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006). We find no reversible error with Teddy's sentence.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-11195
Summary Calendar

D.C. Docket No. 2:07-CR-65-23

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

TUAN ANH TRAN

Defendant-Appellant

Appeal from the United States District Court for the Northern District of Texas, Amarillo

Before REAVLEY, JOLLY, and OWEN, Circuit Judges.

JUDGMENT

(Filed Jul. 31, 2009)

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

ISSUED AS MANDATE:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

UNITED STATES	§	
OF AMERICA	§	
	§	
V.	§	
	§	
SITTHIPHONE	§	CRIMINAL ACTION
PHENGSENGKHAM (01)	§	NO. 2:07-CR-065-J
ITTHISON	§	
PHENGSENGKHAM (02)	§	
TUAN ANH TRAN (23)	§	
STEPHANIE FENG TRAN(24)	§	

VERDICT OF THE JURY

(Filed Aug. 20, 2007)

We, the Jury, find the Defendant, **SITTHIPHONE PHENGSENGKHAM** a/k/a Teddy Phengsengkham,

GUILTY
"Not Guilty" or "Guilty"

as charged in Count 1 of the Superseding Indictment of in the above-entitled and numbered cause.

Do you find beyond a reasonable doubt that the conspiracy to possess with intent to distribute involved at least 500 grams or more of a mixture and

substance containing a detectable amount of methamphetamine? Answer "Yes" or "No."

YES X NO _____

Do you find beyond a reasonable doubt that the conspiracy to possess with intent to distribute involved at least 100 grams or more of a mixture and substance containing a detectable amount of cocaine? Answer "Yes" or "No."

YES X NO _____

We, the Jury, find the Defendant, **ITTHISON PHENGSENGKHAM** a/k/a Eddy Phengsengkham,

GUILTY
"Not Guilty" or "Guilty"

as charged in Count I of the Superseding Indictment in the above-entitled and numbered cause.

Do you find beyond a reasonable doubt that the conspiracy to possess with intent to distribute involved at least 500 grams or more of a mixture and substance containing a delectable amount of methamphetamine? Answer "Yes" or "No."

YES X NO _____

Do you find beyond a reasonable doubt that the conspiracy to possess with intent to distribute involved at least 100 grains or more of a mixture and substance containing a detectable amount of cocaine? Answer "Yes" or "No."

YES X NO _____

We, the Jury, find the Defendant, **SITTHIPHONE PHENGSENGKHAM** a/k/a Teddy Phengsengkham,

GUILTY
"Not Guilty" or "Guilty"

as charged in Count 2 of the Superseding I Indictment in the above-entitled and numbed cause.

We, the Jury, find the Defendant, **ITTHISON PHENGSENGKHAM** a/k/a Eddy Phengsengkham,

GUILTY
"Not Guilty" or "Guilty"

as charged in Count 2 of the Superseding Indictment in the above-entitled and numbered cause.

We, the Jury, fend the Defendant, **TUAN ANH TRAN**,

GUILTY
"Not Guilty" or "Guilty"

as charged in Count 2 of the Superseding Indictment in the above-entitled and numbered cause.

We, the Jury, find the Defendant, **STEPHANIE FENG TRAN**,

NOT GUILTY
"Not Guilty" or "Guilty"

as charged in Count 2 of the Superseding indictment in the above-entitled and numbered cause.

We, the Jury, find the Defendant, **ITTHISON PHENGSENGKHAM** a/k/a Eddy Phengsengkham,

GUILTY
"Not Guilty" or "Guilty"

as charged in Count 5 of the Superseding Indictment in the above-entitled and numbered cause.

DATE: 8/20/07 FOREPERSON

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

UNITED STATES OF AMERICA	*	
VS.	*	CASE NO. 2:07-CR-65(1)-J
SITTHIPHONE PHENGSENGKHAM	*	

==========

SENTENCING

NOVEMBER 13, 2007

==========

(Filed Feb. 12, 2008)

A-P-P-E-A-R-A-N-C-E-S:

FOR THE GOVERNMENT:

MS. VICKI LAMBERSON
Assistant U.S. Attorney
500 South Taylor, LB 238
Amarillo, Texas 79101-2442

FOR DEFENDANT SITTHIPHONE PHENGSENGKHAM:

MR. E. DEAN ROPER
Attorney at Law
320 S. Polk, Suite 901
Amarillo, Texas 79101

On the 13th day of November, 2007, a Sentencing in the above-entitled and numbered cause came on to

be heard before the **Honorable Mary Lou Robinson**, United States District Judge for the Northern District of Texas, presiding.

* * *

[4] And you can have a seat while your lawyer speaks to the Court.

MR. ROPER: Real briefly, Your Honor. We would ask that Mr. Phengsengkham be permitted to serve – participate in a drug rehab program, as I think the evidence indicates that he has been involved in narcotics in the past and wishes to receive the benefit of some rehab.

Also, we would ask that he – the Court recommend a placement facility as near to Amarillo as his inmate classification would permit, as all of his family is in Amarillo.

Thank you.

THE COURT: Is there any reason why the Court should not now proceed to sentencing?

MS. LAMBERSON: No reason.

MR. ROPER: No, Your Honor.

THE COURT: Sitthiphone Phengsengkham, it is the judgment of this Court that you be committed to the custody of the Federal Bureau of Prisons for a term of 293 months on Count 1, and 240 months on Count 2. The sentence on each count to run concurrently with the sentence on the other counts.

The Court does not impose a fine.

The Court orders that, upon your release from incarceration, you be placed on supervised release for five

* * *

[6] You shall not enter into any self-employment while under supervision without prior approval of the probation officer.

You shall obtain approval of the U.S. Probation Officer prior to a change in residence or living situation.

The Court imposes a special assessment of $200, which must be paid.

Now, the Court has imposed a sentence within the guideline range, and that's because of your obvious criminal lifestyle, the fact that you have not shown any other source of income and no regard for the safety of the community by distributing drugs.

This sentence, the Court believes, will address the Court's sentencing objectives of punishment and protection of the community.

I've not imposed a fine because you have a lengthy prison sentence, and you'll need all of your financial resources to establish yourself upon your release.

The Court does – imposed the period of supervised release. The statutory provision is not less than

five years on Count 1, and the Court has provided that those terms of supervised release run concurrently.

The Court imposed a special assessment of $200. The law requires that I do that.

I will – I will recommend that you be incarcerated

* * *

UNITED STATES DISTRICT COURT

Northern District of Texas

UNITED STATES OF AMERICA

V.

SITTHIPHONE PHENGSENGKHAM

a/k/a Teddy Phengsengkham

JUDGMENT IN A CRIMINAL CASE

(Filed Nov. 13, 2007)

Case Number: 2:07-cr-065-J(01)

USM Number: 36470-177

Dean Roper
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☑ was found guilty on count(s) One (1) and Two (2) of the Superseding Indictment filed April 4, 2007 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 USC §846 in violation of 21 U.S.C. §841(a)(1) and (b)(1)(A) and (B)	Conspiracy to Commit a Drug Offense (Possession With intent to Distribute 500 Grams or More of Methamphetamine and 100 Grams or More of Cocaine)	2/15/07	1s

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) ___

☑ Count(s) of the Original Indictment ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

November 13, 2007
Date of Imposition of Judgment

/s/ Mary Lou Robinson
Signature of Judge

MARY LOU ROBINSON
U.S. DISTRICT JUDGE
Name and Title of Judge

November 13, 2007
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 u.s.c. §1956(H) IN VIOLATION OF 18 U.S.C. §1956(A)(1)	Money Laundering Conspiracy	2/15/07	2s

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **293 Months on Count 1 and 240 Months on Count 2. Sentences to run concurrently with each other, for a total sentence of 293 months.**

☑ The court makes the following recommendations to the Bureau of Prisons:

that defendant be Incarcerated as close to Amarillo, TX, as is consistent with defendant's classification and that defendant participate in the Comprehensive Drug Treatment Program offered by BOP.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on _____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 5 years on Count 1; and 3 years on Count 2. Both terms of supervised release shall run concurrently with each other, for a net term of 5 years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check if applicable.)

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the

defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use,

distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

2. The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Federal Bureau of Prisons.

3. The defendant shall provide to the probation officer any requested financial information.

4. The defendant shall not enter into any self-employment while under supervision without prior approval of the probation officer.

5. The defendant shall obtain approval of the U.S. Probation Officer prior to a change in residence or living situation.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	**$200**	**$**	**$**

☐ The determination of restitution is deferred until ___. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss1*	Restitution Ordered	Priority or Percentage

TOTALS $ _____ $ _____

☐ Restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, for offenses committed on or after September 13, 1994 but before April 23, 1996.

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

It is ordered that the defendant shall pay to the United States a special assessment of $200.00, which shall be due immediately. Said Special assessment shall be made to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States: See Sheet 6B.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

UNITED STATES OF AMERICA	§	
V.	§	2:07-CR-065-J (23)
TUAN ANH TRAN	§	

ORDER

(Filed Jul. 27, 2007)

Defendant is granted leave to file a motion to sever. The Court has considered the motion to sever tendered with the motion for leave and the government's response. The motion to sever is DENIED.

It is so ORDERED.

SIGNED this 27th day of July, 2007.

/s/ Mary Lou Robinson
MARY LOU ROBINSON
United States District Judge

Rule of Procedure and Federal Statute at Issue

Federal Rule of Criminal Procedure 14(a) states:

> Relief. If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

18 U.S.C. § 3553(a) states:

> a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –
>
> (1) the nature and circumstances of the offense and history and characteristics of the defendant;
>
> (2) the need for the sentence imposed –
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments

have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, united States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the deendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

Volume I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
AMARILLO DIVISION

UNITED STATES OF AMERICA,	*	
Government,	*	
VS.	*	
SITTHIPHONE PHENGSENGKHAM,	*	CASE NO. 2:07-CR-65-J
ITTHISON PHENGSENGKHAM,	*	
TUAN ANH TRAN, and	*	
STEPHANIE FENG TRAN,	*	
Defendants.	*	

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CRIMINAL TRIAL BY JURY

AUGUST 14 & 15, 2007

VOLUME I OF II

(Pages 1-383)

==========

(Filed Feb. 12, 2008)

On the 14th, 15th, 16th, 17th, and 20th days of August, 2007, a Trial by Jury in the above-entitled numbered cause came on to be heard before the **Honorable Mary Lou Robinson**, United States District Judge for the Northern District of Texas, presiding, and a **jury**;

Proceedings reported by mechanical stenography; transcript produced by computer.

[154] Dan Baldwin (Direct – Government)

A. Yes, I did.

Q. Did the undercover buys that he did for y'all, did they occur – where – what locations did they occur at? What locations were involved?

A. There were two locations, 5407 Amarillo Boulevard East, which is the Colonial Manor Hotel, and also 7403 Amarillo Boulevard East, which is the trailer, the residence of Mr. Sitthiphone – or, excuse me, Itthison Phengsengkham.

MS. LAMBERSON: May I approach the witness, Your Honor?

THE COURT: You may.

Q. **(By Ms. Lamberson)** Agent Baldwin, first I'm going to show you what's been marked as Government's Exhibit P-1, and do you recognize that?

A. Yes, I do recognize that.

Q. And what does this picture depict?

A. It depicts two locations on Amarillo – Amarillo Boulevard East here in Amarillo, Texas; one which is the Colonial Manor Motel, and the other which is to the west there, would be the Xtacy Club.

Q. And does this photograph truly and accurately depict the way those locations appeared during the time you were doing the undercover buys?

A. Yes, it does.

* * *

[296] Eddie Cramer (Cross – Mr. Roper)

A. It was just a dark colored. You know, the only time I'd really seen it is at night, in the evening, you know.

Q. There's – would you agree with me, there's several models of Hummers?

A. Yes, sir.

Q. What model was the Hummer that you saw?

A. I don't know the year models.

Q. I'm not talking – I'm sorry. Let me clarify it for you, please. I'm not trying to confuse you.

A. It's not the military version; I know that much.

Q. Okay. It's kind of the H2, the knock-off of the –

A. Yeah, the smaller version, yeah.

Q. The smaller version. And what was the body style of that Hummer?

A. The – I'm not getting what you're asking.

Q. Do you know that there's more than one body style for a Hummer?

A. Yeah. I know there's the H2 and – I know of two versions, the military version and the H2. That's all I know.

Q. Okay. Let's talk just strictly about the H2. Is there a kind of a Suburban-style version and a pickup-style version?

[297] A. Yeah, I guess there is, but I've never – you know, I'm not – I don't notice – I don't notice that about the Hummer.

Q. Have you ever seen a pickup-style version?

A. No. I mean, not – like I said, I don't pay attention to –

Q. And by pickup style, I mean a Hummer that's got a bed on the back, an open bed?

A. Oh, okay. Now I know what you're talking about. No, it's not. It's the Suburban style.

Q. And the Hummer that you saw in the parking lot that night was the Suburban style; it did not have a pickup bed on it?

A. Yeah, it was the Suburban style.

Q. And just a dark color; is that correct?

A. Yeah.

Q. And you never saw who occupied that?

A. Huh-uh.

Q. And it's your – how long would you say that Eddy was gone from the room?

A. Right – five minutes, maybe under five minutes.

Q. Five minutes or less?

A. Yeah.

Q. Now, you had had occasion to be in Room 46 with Eddy before when there would be nobody in the parking lot,

* * *

[299] Q. You just saw him walk by this Hummer that was parked in the parking lot?

A. Yeah, he walked right behind it.

Q. Okay. And you never saw an exchange of anything?

A. No.

Q. And did you – did you see when the Hummer left?

A. No, I didn't.

Q. Okay. So you don't know how long the Hummer was there?

A. No.

Q. You never saw who you believe to be Teddy Phengsengkham that night?

A. No.

Q. When Eddy returned to the room, describe to me again how the methamphetamine was concealed.

A. It was in a black, small duffel bag like a tool bag.

Q. It was not in a twelve-by-twelve freezer bag?

A. That's what was inside the duffel bag.

Q. Okay. But there was – he did not carry it in in his coat?

A. I don't recall that. I recall him bringing in a black duffel bag.

Q. Did you ever see Teddy Phengsengkham in Room 46 or Room 47 at the motel?

[300] A. No.

Q. You talk about the occasion of which you were at Eddy Phengsengkham's trailer, 7401 –

A. Uh-huh.

Q. – Amarillo Boulevard East?

And when you arrived, there was an 18-wheeler there?

A. Yeah.

Q. Did you in your statement to – when you were debriefed, did you state that that vehicle was accompanied by a white BMW?

A. Yes.

Q. Have you ever known Teddy Phengsengkham to drive a white BMW?

A. No.

Q. When you arrived at that location, on any occasion that evening did you ever see Teddy Phengsengkham?

A. No.

Q. Did you tell the agent that was debriefing you that Eddy received his drugs from an old Mexican guy in California?

A. Yeah. That was who was driving the vehicle or the 18-wheeler, I assume.

Q. Did you tell the agent Eddy Phengsengkham's source of supply was a person described as the old Mexican dude in

* * *

[304] was in the Hummer?

A. No.

Q. But you do recall it was a Suburban-like Hummer?

A. Yeah.

Q. Without a bed on the back?

A. No, it was a Suburban style.

Q. And you're pretty certain of that?

A. I'm certain.

Q. Now, did you have occasion – on the night at the trailer with the semi rig, did you ever see any methamphetamine that night?

A. Yes, when Eddy walked back into the trailer.

Q. And was – and I believe you described what he was carrying was a black duffel bag?

A. Yeah.

Q. Was it similar to the black duffel bag that you saw the night of September the 9th?

A. Yes, sir.

Q. But you're certain that at the trailer that Teddy Phengsengkham wasn't anywhere around?

A. Nope.

Q. Now, you talk about another occasion of which you saw an 18-wheeler tractor-trailer rig at the location of the Xtacy Club; is that correct?

A. Uh-huh.

[305] Q. What time of day or night was that?

A. That was late afternoon.

Q. Broad daylight?

A. It wasn't broad daylight. I mean, it was evening time. Late afternoon, early evening.

Q. It wasn't dark yet?

A. No.

Q. Did you see any people around that vehicle?

A. No. It's – there was other vehicles there. I just assumed they were all inside the club.

Q. Have you ever seen 18-wheelers parked at other businesses along Amarillo Boulevard?

A. Yes.

Q. They all doing drug business?

A. I don't know what they were doing.

Q. Never saw Teddy Phengsengkham there?

A. Where?

Q. At the Xtacy Club when the 18-wheeler was in the parking lot.

A. I seen the Hummer parked there.

Q. You saw a Hummer?

A. Uh-huh.

Q. Was it a Suburban-like Hummer?

A. The same style Hummer I seen the night September 9th.

* * *

[308] A. Ten, I believe.

Q. And it's your testimony that you saw Teddy Phengsengkham maybe twice in your life?

A. Yeah.

Q. And you did not see him on September the 9th of 2006 at the motel?

A. No, all I saw was a Hummer.

MR. ROPER: Thank you.

CROSS EXAMINATION

BY MR. CLARK:

Q. Mr. Cramer, I'm – I need to back up and cover one thing with you. Didn't you tell Mr. Martinez, when he was questioning you, that you had never done any work for Ted at Club Xtacy? Is that true?

A. That's true.

Q. Well, but did I not hear you tell Ms. Lamberson that you were asked to make some secret compartments for Ted?

A. No, it wasn't for Ted. It was for Eddy.

Q. It was for Eddy?

A. Uh-huh.

Q. And these secret compartments, were those strictly for Eddy's use, or were they for Ted and Eddy's use; did you know?

A. I just talked to Eddy. You know, I offered a

* * *

[354] for fifteen minutes. Be back in the jury room ready to come in the courtroom in fifteen minutes.

COURT SECURITY OFFICER: All rise.

(There was a recess taken; after which, the following took place in open court with the defendants and jury present.)

MR. ROPER: May it please the Court?

CROSS EXAMINATION

BY MR. ROPER:

Q. Agent Reese, first of all, let me go back. Now, you're familiar with the Hummer that was driven by Teddy Phengsengkham, are you not?

A. Yes.

Q. In fact, y'all took possession of that –

A. Yes, we did.

Q. – at the time of the arrest?

A. Yes.

MR. ROPER: May I have just a second, Your Honor?

THE COURT: Yes, sir.

(Pause.)

MR. ROPER: May I approach the witness, Your Honor?

THE COURT: You may.

Q. **(By Mr. Roper)** Agent, I'm going to show you what I've marked for identification purposes as Defendant 1's Exhibit No. 15. Would you look at that please and tell me [355] if that is the truck that was driven by Ted Phengsengkham?

A. It resembles the truck, yes.

Q. Okay. And that's the same model as the truck that was driven by Phengsengkham?

A. Yes, it was.

Q. And is it clear that that particular truck has a bed on it, a pickup-style bed?

A. Yes, it is.

Q. Okay. And is that – do you recall that the Phengsengkham truck was green in color, not gray?

A. I was under the impression it was a grayish blue even to me.

Q. But –

MR. ROPER: At this time, Your Honor, we would offer Defendant 1's Exhibit No. 15.

MS. LAMBERSON: No objection.

THE COURT: Admitted.

MR. ROPER: May I display it to the jury, please?

THE COURT: Yes.

Q. **(By Mr. Roper)** Now, on September the 21st of 2006, as you testified, you had set up surveillance at [Home Address Omitted], which was the residence of Ted Phengsengkham; is that correct?

A. That's correct.

Q. And at approximately 9:50, somewhere there, then

* * *

[428] Stipulation of Fact No. 2 Read

the date of offense was November 6th, 1999, line that out, and put date of con – date sentence imposed May 8th, 2000.

MR. MARTINEZ: We concur with that.

THE COURT: Does Sitthiphone (sic) Phengsengkham make that stipulation?

MR. MARTINEZ: Yes, Your Honor.

DEFENDANT ITTHISON PHENGSENGKHAM: Yes, ma'am.

THE COURT: And who were the other persons making the stipulation?

MS. DRAKE: Only Itthison Phengsengkham, Your Honor.

THE COURT: The Court will accept that stipulation then.

Now, you offered an exhibit?

MS. DRAKE: Yes, Your Honor. That's M-1. It's the Stipulation of Fact No. 1.

MR. MARTINEZ: I have no objection to M-1, Your Honor.

THE COURT: Admitted.

MR. ROPER: No objection.

MS. SMITH: No objection, Your Honor.

MS. DRAKE: Stipulation of Fact No. 2.

"The United States of America and Sitthiphone Phengsengkham, Defendant; Itthison Phengsengkham, Defendant; Tuan Anh Tran, Defendant; and Stephanie Feng Tran,

* * *

Volume II

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

UNITED STATES OF AMERICA,	*	
Government,	*	
VS.	*	
SITTHIPHONE PHENGSENGKHAM,	*	CASE NO. 2:07-CR-65-J
ITTHISON PHENGSENGKHAM,	*	
TUAN ANH TRAN, and	*	
STEPHANIE FENG TRAN,	*	
Defendants.	*	

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CRIMINAL TRIAL BY JURY

AUGUST 16, 17 & 20, 2007

VOLUME II OF II

(Pages 384-621)

==========

(Filed Feb. 12, 2008)

On the 14th, 15th, 16th, 17th, and 20th days of August, 2007, a Trial by Jury in the above-entitled and numbered cause came on to be heard before the **Honorable Mary Lou Robinson**, United States District Judge for the Northern District of Texas, presiding, and a **jury**;

Proceedings reported by mechanical stenography; transcript produced by computer.

[492] narcotic distribution nor that he did so with the intent that the financial transaction in question, the purchase of Smiley's Discount, would promote the carrying on of the 1 narcotics distribution.

Further, there is insufficient evidence that Tuan Tran knowingly and intentionally conducted and engaged in this conduct or further knew that the financial transaction was designed in whole or in part to conceal and disguise the source, ownership or control of those proceeds which derived or may have derived from narcotics distribution.

THE COURT: Overruled.

MR. CLARK: Secondly, if I may follow up?

THE COURT: Sure.

MR. CLARK: I'm compelled –

THE COURT: I thought you were finished.

MR. CLARK: No, I'm sorry, Your Honor. I'm compelled by current Fifth Circuit law to once again move the Court to reconsider my Motion for Severance previously filed with the Court and ruled on at this time.

THE COURT: Denied. Did you have a motion?

MS. SMITH: I do have a motion, Your Honor.

THE COURT: All right.

MS. SMITH: Your Honor, Lynda Smith for the Defendant, Stephanie Feng Tran, who comes now and makes a Motion for Instructed Verdict of Not Guilty on the charge

* * *

[494] on behalf of Itthison Phengsengkham in regard to Count 2 of the indictment on the money-laundering conspiracy charge.

I believe that the evidence has not established any of the elements in regards to my client, also known as Eddy Phengsengkham, having any knowledge of any financial transactions or that he in any way knew that there was any proceeds involved in any type of real estate transaction or is there any evidence that he was using any money that Eddy – or Teddy Phengsengkham may have had in his possession to further any other unlawful activity.

And we would request the Court for an instructed verdict of not guilty as to Count 2 of the conspiracy.

THE COURT: I assume the Government opposes that?

MS. LAMBERSON: I do oppose.

THE COURT: Overruled. I believe, Ms. Smith, for – you made a request for a charge, which

we just got in the course of trial, for a charge on accessory after the fact. What's the Government's position on that?

MS. LAMBERSON: The one I saw was knowledge.

MS. DRAKE: Knowledge. There's another one.

MS. LAMBERSON: Oh.

MS. SMITH: There's two.

(Pause.)

MS. LAMBERSON: I think that's appropriate.

THE COURT: Okay. We'll at least put that in the

* * *

07-11195

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ITTHISON "EDDY" PHENGSENGKHAM,
SITTHIPHONE "TED" PHENGSENGKHAM,
and TUAN ANH TRAN,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas
Amarillo Division
No. 2:07-CR-065

BRIEF FOR THE UNITED STATES

James T. Jacks
Acting United States Attorney

MATTHEW J. GULDE
Assistant United States Attorney
Illinois Bar No. 6272325
500 S. Taylor, Suite 300 LB 238
Amarillo, Texas 79101
Telephone: 806.324.2320
Facsimile: 806.324.2399
E-Mail: matthew.gulde@usdoj.gov
ATTORNEYS FOR APPELLEE

* * *

IV. The District Court Properly Considered 18 U.S.C. § 3553(a) in Sentencing Ted

Ted complains that the district court failed to adequately consider – or at least state her reliance upon – the sentencing factors listed at 18 U.S.C. § 3553(a). A review of the sentencing proceeding shows that this complaint is misplaced.

STANDARD OF REVIEW

Sentencing decisions are reviewed for abuse of discretion. *Gall v. United States*, 128 S. Ct. 586, 596 (2007) ("[T]he abuse-of-discretion standard of review applies to appellate review of all sentencing decisions – whether inside or outside the Guidelines range.").

LEGAL ANALYSIS

"[A] district court need not recite each of the § 3553(a) factors and explain its applicability." *United States v. Herrera-Garduno*, 519 F.3d 526, 531 (5th Cir. 2008); *United States v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006) ("[A] checklist recitation of the section 3553(a) factors is neither necessary nor sufficient for a sentence to be reasonable"). A sentence that is close to the range recommended by the United States Sentencing Guidelines requires less articulation of the § 3553(a) factors than a sentence that falls well outside the guidelines. *Smith*, 440 F.3d at 707 ("[T]he district court must more thoroughly articulate its

reasons when it imposes a non-Guideline sentence than when it imposes a sentence under authority of the Sentencing Guidelines.")

In this case, the district court imposed a sentence within the advisory guideline range of 235-293 months. (TED-R5/6.) Although very little explanation is required for a sentence that falls within the guidelines, the court explained why she imposed a sentence at the top of the recommended range: "that's because of your obvious criminal lifestyle, the fact that you have not shown any other source of income and no regard for the safety of the community by distributing drugs." (*Id.*) This statement speaks directly to several § 3553(a) factors: the nature and circumstances of the offense – (a)(1); the history and circumstances of the defendant – (a)(1); the need for the sentence to reflect the seriousness of the offense – (a)(2)(A), provide just punishment – (a)(2)(A), afford deterrence – (a)(2)(B), and protect the public – (a)(2)(C); and the applicable guidelines range – (a)(4)(A).

While the law clearly does not require a recitation of the § 3553(a) sentencing factors, particularly when the sentence falls within the range recommended by the Sentencing Guidelines, the judge in this case articulated facts that relate to seven of the relevant sentencing factors. Accordingly, the district court did not abuse its discretion in sentencing Ted.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

UNITED STATES OF AMERICA	§	
	§	CASE NO. 2:07-CR-065 (23)
VS.	§	("ECF")
	§	
TUAN ANH TRAN	§	

MOTION FOR RELIEF FROM PREJUDICIAL JOINDER AND ACCOMPANYING BRIEF

(Filed Jul. 23, 2007)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Defendant TUAN ANH TRAN, by and through counsel, hereby requests, pursuant to Rule 14, Relief From Prejudicial Joinder, Federal Rules of Criminal Procedure, an order of severance of Defendant TRAN's case from the other defendants named in the Government's Superseding Indictment, Counts One and Two, alleging Conspiracy to Possess With Intent to Deliver Controlled Substances and Conspiracy to Commit Money Laundering in violation of 21 U.S.C. § 846 and 18 U.S.C. § 1956(b) respectively, and in support thereof would show the Court as follows:

Preliminary Statement

Defendant TRAN is charged in a two-count indictment under Count Two which alleges a violation

of 18 U.S.C. § 1956(b). He, along with his wife, co-defendant Stephanie Feng Tran, and six other co-defendants are charged with having engaged in a money laundering conspiracy. Those same six co-defendants are also charged under Count One of the same indictment which alleges a conspiracy to intentionally and knowingly possess with intent to distribute 500 grams or more of methamphetamine and at least 100 grams of cocaine, all in violation of 21 U.S.C. § 846. Defendant TRAN and his co-defendant wife are not listed as co-conspirators under Count One.

A joinder of both counts and all named defendants under the indictment into a single trial compels Defendant TRAN and his co-defendant wife to defend against both counts rather than the one to which they are named, thereby prejudicing the TRAN's. This prejudice outweighs the government's interest in the economy of judicial administration and is of such a magnitude that the district court cannot provide adequate protection.

Law Applicable

Rule 14, Relief from Prejudicial Joinder, provides in part:

> (a) Relief. If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or

> separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires . . .

In the case of prejudice flowing from an improper joinder of offenses, three primary considerations usually come into play. The first is recognition that improper consolidation of offenses concerning various defendants may render inconsistent defenses which concern the core or essence of a defense so antagonistic that severance is compelled. *United States v. Berkowitz*, 662 F.2d 1127, 1134 (5th Cir. Unit B 1981). The district court is instructed to also take into consideration the public interests in judicial economy and the administration of justice served by joint trials, together with the possibility that limiting instructions and other less drastic means will suffice to cure any risk of prejudice. *See Zafiro v. United States*, 113 S.Ct. 933, 938 (1993). However, severance is required if there is a serious risk that a joint trial would compromise a specific trial right of one of the complaining defendants or would prevent the jury from making a reliable judgment about guilt or innocence. *Id.*

The second consideration when determining severance of defendants or offenses is the risk that the jury may rely on evidence of one crime to infer a criminal disposition and find guilt. For example, in *United States v. Lewis*, 787 F.2d 1318, 1321-22, (9th Cir. 1986), *modified*, 798 F.2d 1250 (9th Cir. 1989), the defendant was prejudiced by the admission of other crimes in one count which spilled over to

contribute to conviction on the second count where the evidence was termed, at best, "weak."

A third consideration is the real risk, in the face of improper consolidation of defendants or offenses, that the jury may simply cumulate evidence of various crimes committed by those defendants not connected to the complaining defendant on a different count in its determination of guilt. In other words, the sheer weight of evidence of wide-ranging offenses committed by various defendants, totally divorced and separate from those offenses alleged against a complaining defendant, may be so overarching that the jury is simply incapable of compartmentalizing the evidence before determining the sufficiency of evidence as to each count. *See United States v. Massa*, 740 F.2d 629, 644 (8th Cir. 1985).

Risk of prejudice

In the case at bar, Defendant TRAN, together with his co-defendant spouse, is in a unique situation. All of the defendants named in County [sic] Two, with the exception of TRAN and his spouse, are also named in Count One which alleges a far-reaching, complex drug distribution conspiracy. Given the sheer number of defendants named and involved under Count One and the corresponding weight of evidence that Defendant TRAN reasonably expects the Government to produce in order to prove the existence of such conspiracy – not to mention the multitude of overt acts committed by the various named defendants in

furtherance of the conspiracy – there will be a definite spillover effect of this evidence. And the bulk of that spillover evidence will have little if anything to do with the evidence underlying the existence of an alleged money laundering conspiracy or Defendant TRAN's connection to said conspiracy.

Government witnesses will be required to make references to this wide-ranging drug delivery conspiracy. Indeed, it is anticipated that this will make up the bulk of the Government's prosecution against all defendants who proceed to trial. It is extremely doubtful that any oral or written limiting instructions delivered by the court will provide the prophylactic protection necessary to insulate Defendant TRAN, as well as his co-defendant spouse, from the natural effect of the spillover. The efficacy of limiting instructions and other admonitions given by the court in such a situation will be significantly impaired.

As a result, the jury will simply be unable to sequester that specific evidence relevant to the money laundering count as it pertains to the TRAN's without attributing a degree of guilt to them relative to the drug conspiracy count. This guilt by association taints the ability of the jury to render a reliable judgment concerning the TRAN's guilt under the sole count of conspiracy to engage in money laundering. Only a separate trial will ensure that the jury either not cumulate evidence of the drug delivery conspiracy in its determination of the guilt or innocence of the TRAN's or properly compartmentalize *only* that evidence of money laundering which might implicate the

TRAN's, set against a backdrop of a very large, sophisticated drug delivery conspiracy.

WHEREFORE, PREMISES CONSIDERED, Defendant TUAN ANH TRAN prays that upon consideration of the authority cited herein, the unique facts of the present case and argument of counsel, this Court enter its order severing his sole count of conspiracy to commit money laundering from all other named defendants identified and charged under Counts One and Two of the subject indictment.

Respectfully submitted,

WARREN L. CLARK
ATTORNEY AT LAW
P.O. Box 2408 (79105)
203 W. 8th Ave., Ste. 320
Amarillo, Texas 79101
806/379-7655
806/371-9610 (fax)

s/ Warren L. Clark
Counsel for Defendant
SBN 04300500

CERTIFICATE OF CONFERENCE

This is to certify that the undersigned counsel has consulted with the Assistant U.S. Attorney regarding this Motion and she indicated that the Government OPPOSES said motion.

s/ Warren L. Clark
Warren L. Clark

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2007, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorney of record who has consented in writing to accept this Notice as service of this document by electronic means: Ms. Vicki Lamberson, Assistant U.S. Attorney, 500 S. Taylor, Ste. 300, Amarillo, Texas 79101.

s/ Warren L. Clark
Warren L. Clark

No. 07-11195

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
TUAN ANH TRAN,
Defendant-Appellant.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

BRIEF ON APPEAL

(Filed Jun. 9, 2008)

AARON R. CLEMENTS
Tex. SBN 00795861
HURLEY & GUINN
1805-13th Street
Lubbock, TX 79401
(806) 771-0700
(806) 763-8199 Fax

ATTORNEYS FOR
APPELLANT

* * *

quantity of evidence of the drug conspiracy, combined with the spillover effects of its natural lead-ins to the Phengsengkham's side of the alleged money laundering conspiracy, warranted severance, particularly when considering that the alleged money laundering conspiracy indeed had two sides, one being the Phengsengkhams, the other being the Trans[8]. These spillover effects were additionally exacerbated by the insufficiency of the Government's case, as outlined *supra*.

Furthermore, beyond the cumulative effects of the overwhelming evidence against the other defendants along with the spillover effects resulting from the interrelated nature of the two conspiracies and the weakness of the Government's case against Appellant and his wife, the trial court's denial of a severance denied Appellant of the right to compulsory process and to confrontation under the Sixth Amendment, one of the "special trial rights" that justifies a severance. *United States v. Barnett*, 197 F.3d 138, 145 (5th Cir. 1999). In this case, Appellant was denied the opportunity to call Teddy Phengsengkham to explain

---

[8] Appellant must, at the outset, concede that this Court will ordinarily find that a proper jury instruction to consider the evidence against each defendant separately will alleviate any undue prejudice, and that such an instruction was given in this case. R., II, 327; *United States v. Ramos Rodriguez*, 926 F.2d 418, 421 (5th Cir. 1991). However, in this case, Appellant would still suggest that the interlinking nature of the conspiracies alleged overwhelmed the ameliorating effects of that instruction.

the conversations embodied in Gov't Exh's. T-13, T-17, T-18, and T-22; while ordinarily, a defendant must demonstrate some indication that the co-defendant would testify at a separate trial to justify a severance (see, e.g., *United States v. Kane*, 887 F.2d 568, 573 (5th Cir. 1989)), in this particular case, if the motion to sever had been granted (especially upon its oral renewal at the close of evidence), Teddy Phengsengkham would likely have been convicted, and his Fifth Amendment rights would no longer protect him against compulsory process. Given that many of the statements made by Teddy in the wiretapped conversations were the principal (albeit insufficient) evidence against Appellant, it was error for the trial court to grant Appellant a severance in order to preserve Appellant's rights to compulsory process and confrontation.

Therefore, because the trial court failed to grant Appellant's motion to sever his trial, resulting in undue prejudice from multiple, interlinking factors, and assuming, *arguendo*, that the evidence was sufficient to sustain the jury's verdict, this Court should reverse the judgment of the trial court and remand for a new, separate trial.

III. THE TRIAL COURT ERRED BY INSTRUCTING GIVING THE JURY AN INSTRUCTION ON "DELIBERATE INDIFFERENCE"

Finally, the trial court erred by overruling Appellant's objection to the trial court's charge to the

jury insofar as that charge included an instruction regarding "deliberate indifference."

* * *